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# In the Supreme Court of the United States

JOSEPH JESNER, ET AL., PETITIONERS

*v.*

ARAB BANK, PLC

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## BRIEF OF UNION OF ARAB BANKS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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4 William Blackstone, *Commentaries on the Laws of England* (1769) ..... 32

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Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum L. Rev. 1094 (2009) ..... 25

Central Bank of Jordan, Regulations of Anti-Money Laundering and Terrorism Financing, Circular No. 29/2006, arts. V-VIII (2006) ..... 30

CHIPS, *Annual Statistics from 1970 to 2016*, https://www.theclearing house.org/-/media/tch/pay%20co/chips/reports%20and%20guides/chips%20volume%20through%20august%202016.pdf?la=en ..... 10, 35

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Lloyd J. Dumas, *Counterterrorism and Economic Policy*, 21 Transnat'l L. & Contemp. Probs. 84 (2012) ..... 20

European Commission, *Status of Implementation of Directive 95/46 on the Protection of Individuals with regard to the Processing of Personal Data* (last visited Aug. 24, 2017), http://ec.europa.eu/justice/data-protection/law/status-implementation/index_en.htm ..... 13

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Yaya Fanusie & Landon Heid, *What ISIS Is Banking On*, Forbes (June 17, 2016) ..... 20

Financial Action Task Force, FATF Recommendations (2016) ..... 31

Financial Action Task Force, *MENAFATF*, http://www.fatf-gafi.org/pages/menafatf.html (last visited Aug. 24, 2017) ..... 31

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Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M 1002 (July 17, 1998) ..... 24

Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 6, May 25, 1993, 32 I.L.M. 1192 ..... 25

Statute of the International Criminal Tribunal for Rwanda, art. 5, Nov. 8, 1994, 33 I.L.M. 1598 ..... 25

Statute of the Special Tribunal for Lebanon, art. 3 ..... 25, 26

United Nations, International Convention for the Suppression of the Financing of Terrorism, art. 12, Dec. 9, 1999, 2178 U.N.T.S. 235 ..... 31

U.S. Dep't Treasury, *OFAC Regulations for the Financial Community* (2002), http://www.treasury. gov/resource-center/sanctions/documents/faccbk.pdf ..... 29

Anne-Marie Verwiel & Karlijn van der Voort, *STL Appeals Chamber Decides It Can Prosecute Legal Persons For Contempt*, Int'l Justice Monitor (Oct. 13, 2014), https://www.ijmoni-tor.org/2014/10/stl-appeals-chamber-decides-it-can-prosecute-legal-persons-for-contempt/ ..... 6

World Bank Group, *Stakeholder Dialogue On De-Risking: Findings and Recommendations* (2016), http://files.acams. org/pdfs/2016/Deris king-Final.pdf ..... 19

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## BRIEF OF UNION ARAB BANKS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

## INTEREST OF AMICUS CURIAE[1]

The Union of Arab Banks (UAB) fosters cooperation among banks, develops the Arab financial sector, and promotes the role of Arab banks in the region. UAB has over 340 members, including the largest and most prestigious Arab financial institutions, including respondent Arab Bank.

UAB promotes cohesion in the banking sector and economic development in the region by establishing policies and rules, and introducing new financial in-

[1] The parties have filed blanket consent to the filing of amicus curiae briefs. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

struments to the marketplace. UAB also serves as a vital resource for the banking community, issuing leading publications on Islamic banking and offering regular seminars and conferences to exchange ideas on important issues for Arab economies. In particular, UAB promotes best practices and international dialogue on the prevention of terrorist financing and other forms of money laundering, partnering with the U.S. Department of the Treasury and the Association of Certified Anti-Money Laundering Specialists.

As the largest banking and financial consortium in the region, UAB is a true representative of the Arab banking community, and is uniquely qualified to comment on the issues raised in this appeal. UAB works to ensure that member banks have the tools to detect, report, and eliminate terrorist financing. UAB is uniquely qualified to address the counterproductive impact on the financial systems of that region that would result from a ruling holding foreign banks liable solely for having provided common banking services to individuals or entities who participated in terrorist activities.

## SUMMARY OF THE ARGUMENT

When federal courts expand the bases for liability under the Alien Tort Statute (ATS), 28 U.S.C. 1350, they are projecting new rules of federal common law onto foreign actors and events. The First Congress enacted the ATS to provide a forum for a narrow range of claims involving conduct in violation of the law of nations for which international law would expect the United States to supply a judicial remedy. By providing a forum to resolve these specific disputes, Congress aimed to ease diplomatic tensions. Because imposing new forms of common law liability on overseas actors risks frustrating Congress's conciliatory purpose, courts must proceed cautiously before creating new bases of liability under the ATS.

Caution is particularly appropriate when considering whether to extend liability to a new class of defendants, such as private corporations. There is no tradition of corporate liability for international law violations, and for good reason. Yet, corporations are inevitably attractive targets of ATS litigation, even where their connection to the harm is remote. Many plaintiffs have targeted corporations in those courts that permit such suits. See Chamber of Commerce of the U.S. et al. Amicus Br. 34. And these suits have already caused international controversy, including diplomatic protests by numerous allies. Moreover, as the architects of the Nuremberg Tribunal recognized in declining to exercise jurisdiction over corporations, judgments against corporations may harm innocent individuals.

The regulation of corporations is properly left to domestic law, as determined by political branches able

to craft and revise intricate rules to balance sometimes competing objectives. In many instances, as in this case, the true gravamen of the plaintiffs' complaint is that obligations should be imposed on corporations affirmatively to prevent or deter the wrongful acts of others. Whether imposing such duties is appropriate is a quintessential question of domestic regulatory law, not something for the courts of one state to impose on corporations doing business in foreign lands.

Unlike common law liability under the ATS, local—and even coordinated cross-border—regulation can be calibrated to address unique circumstances that may exist in a region or country and to further specific policy goals. UAB's members are subject to substantial domestic regulation, and comply with extensive requirements in connection with their participation in the international financial system. Imposition of rules extending ATS liability would frustrate the purposes of those regulatory efforts. In turbulent parts of the globe, as in the Middle East, governments have adopted policies designed to develop the formal economic sector and to strengthen its ties with the international economy. Arab Bank, and UAB's other members, play important roles in that development. Plaintiffs' proposal to impose expansive ATS liability based on providing common banking services tied to the international financial system would pose a grave threat to those governmental policy objectives. The viability of many institutions would be threatened. At the very least, they would be forced to constrict significantly their services. The effect would be to drive much of the banking conducted in the region out of the formal sec-

tor, thereby undermining the goal of subjecting financial transactions to greater regulation and scrutiny.

Finally, even if the ATS allowed for corporate liability in principle, these plaintiffs could not sue under the ATS, because all the "relevant conduct" from which the claims arise occurred abroad. Regardless of whether the mere clearing of dollar denominated transactions through the Clearing House Interbank Payments System (CHIPS) would give rise to United States regulatory jurisdiction, Congress has given no indication that so fleeting a connection to the United States is a sufficient basis for U.S. courts to assert federal common law authority.

## ARGUMENT

### I. EXPANDING ATS LIABILITY TO REACH CORPORATIONS IMPROPERLY PROJECTS U.S. COMMON LAW ABROAD, RISKING THE KIND OF DIPLOMATIC CONFLICT THE ATS WAS MEANT TO AVOID

Permitting corporate liability under the ATS would require the Court to manufacture a new basis of federal common law liability. Following its settled approach, the Court must proceed cautiously, mindful of the likelihood that projecting U.S. common law onto foreign actors and overseas events will aggravate the diplomatic tensions that the ATS was intended to assuage. Because corporations are uniquely exposed to being sued under the ATS, that caution is particularly apposite here. The threat and imposition of extensive damages on foreign corporations could lead to significant foreign policy conflict. Here, in particular, imposing such liability would undermine the policy goal of encouraging the

development of the formal banking sector in the Middle East.

### A. Recognizing New Bases For Liability Under The ATS Involves Developing And Projecting U.S. Common Law Abroad

The ATS does not provide a statutory cause of action. Rather, it serves only to allow federal courts to exercise jurisdiction over certain torts that are recognized under federal common law. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724-726 (2004). These torts are "based on the * * * law of nations" in that a precondition for any tort to be cognizable under the ATS is that the claim "rest[s] on a norm of international character accepted by the civilized world and defined with * * * specificity." *Id.* at 725. The cause of action, however, is a creature of "federal common law." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013).

In recognizing new torts subject to enforcement through the ATS, courts are inherently creating new common law causes of action. See *Sosa*, 542 U.S. at 725-726 (noting that common law "is not so much found or discovered as it is * * * made or created"). By then applying those causes of action to overseas actors or overseas events, American courts are projecting federal common law abroad.

The ATS, when enacted by the First Congress, was intended to grant jurisdiction over three paradigmatic causes of action: assaults on ambassadors, violations of safe conducts, and piracy. *Sosa*, 542 U.S. at 720. Permitting liability for new forms of conduct increases the ambit of federal common law.

It is no less an act of judicial law-making, and the risks are just as great, when courts adopt new "secondary" or "remedial" rules expanding the categories of potential defendants or the theories under which they can be held liable.

### B. Federal Courts Must Exercise Caution When Expanding The Reach Of The Common Law Under The ATS

"A series of reasons argue for judicial caution" when considering potential expansions of common law liability under the ATS. *Sosa*, 542 U.S. at 725. Even in the purely domestic realm, the Court has generally rejected requests to expand federal common law causes of action. As the Court recognized in *Central Bank of Denver*, where it refused to create a cause of action for "aiding and abetting" securities fraud violations, defining who may be liable for a tort is a task for Congress. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 183 (1994). This Court has recognized "recently and repeatedly" that it is Congress's domain to create new private civil causes of action, which permit aggressive enforcement without the check of prosecutorial discretion. *Sosa*, 542 U.S. at 727 (citing *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001), and *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001)).

Judicial caution is especially necessary in the ATS context because of the "risks of adverse foreign policy consequences" when U.S. common law is imposed on international actors. *Sosa*, 542 U.S. at 728. Recognizing a new cause of action against secondary actors based upon the foreign actions of third parties would

grant private plaintiffs immense new power to influence foreign relations, outside the control of the political branches.

The First Congress therefore struck a delicate balance in defining the scope of claims courts could entertain under the ATS. "[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985). Congress provided the remedial apparatus for an alien harmed by certain violations of the law of nations in circumstances under which the international community would expect the United States to provide a remedy. Such violations, if not redressed, could spark diplomatic conflict. See *Sosa*, 542 U.S. at 717-718. Congress provided a remedy only for violations of "norm[s] of international character accepted by the civilized world." *Id.* at 725. It did not cross the line into "impos[ing] the sovereign will of the United States" on international actors. *Kiobel*, 133 S. Ct. at 1667. The latter risks stoking diplomatic fires, rather than extinguishing them.

The First Congress therefore gave courts no latitude to expand the reach of federal common law unless, at a minimum, the expansion is consistent with the limited scope of liability under the law of nations. See pp. 21-22 *infra*. "[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." *Kiobel*, 133 S. Ct. at 1664. International affairs

should be managed through congressional and executive action, not through extensions of the common law. Where Congress determines that a judicial solution for international law violations is appropriate, Congress can act, as it did with passage of the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, where it provided detailed definitions of the conduct it covers, and specifies what parties may be liable. See 28 U.S.C. 1350 note. Proper deference to the political branches' primary role in conducting foreign affairs dictates that legislation, rather than judicial creation of new causes of action on the basis of a centuries-old jurisdictional statute, is the proper way to proceed.

### C. This Special Caution Applies To Deciding Whether To Extend ATS Liability To Corporations

The expansion of federal common law to impose liability on corporations presents a unique threat to international relations. For a host of legal and practical reasons, corporations are inevitably frequent targets of ATS litigation. Unsurprisingly, this has already engendered international protests.

1. If corporations can be liable under the ATS, they will frequently be subjected to ATS actions for conduct only tangentially related to the wrongs underlying the claims. Corporations are easy to locate and may have substantial assets, whereas the individuals responsible for violating international law will often be difficult to identify or to locate, and, even if found, are likely to be judgment-proof. Unlike individuals, corporations can be present and active in multiple jurisdic-

tions at the same time. A corporation's presence in the United States, even when limited and unrelated to the subject of the suit, makes corporations attractive targets for ATS plaintiffs.

Moreover, corporations are far more likely than individuals to engage in ongoing transactions that cross international borders. These transactions make corporations attractive targets, even when the transactions do not have a significant connection to the conduct at issue in the case or to the countries where the transactions occur. For example, the purported basis for ATS liability in this case is the transfer of funds among overseas branches of foreign banks. The principal vehicle for processing such transfers is CHIPS, which requires dollar transfers to be routed through U.S. banks. Many banks are performing transactions of this nature on a daily basis, which places them at a drastically heightened risk of ATS suits as compared with individuals. In 2015, over 435,000 transactions—worth almost $1.5 trillion in total—were processed through CHIPS on a *daily* basis. See CHIPS, *Annual Statistics from 1970 to 2016* (CHIPs), https://www.theclearinghouse.org/-media/tch/pay%20co/chips/reports%20and%20guides/chips%20volume%20through%20september%202016.pdf?la=en.

Indeed, no individual could match the number of daily activities many corporations perform—often on an automated basis—such as the hundreds of thousands of transactions a large bank may clear in a day. Especially if, as plaintiffs assert here, ATS liability may be predicated merely on the failure to take preventive steps with respect to a handful of those millions of automated transactions conducted in a year, corporations

in general, and banks in particular, will uniquely be exposed to liability.

Recent litigation bears out these concerns. In those circuits that have allowed ATS suits against corporations, corporations have been sued frequently for allegedly "aiding and abetting" violations of international law by third parties, rather than on the ground that they themselves have violated international law. See, *e.g.*, *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 181 (2d Cir. 2014); *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009), cert. denied, 562 U.S. 946 (2010); see also Chamber of Commerce for the U.S. et al. Amicus Br. 34 (noting over 150 suits filed against corporations under the ATS).

Predictably, these suits have already created international controversy. In light of the harm these suits pose to the corporations and many innocent stakeholders, several foreign nations have voiced concerns, including in filings with this Court. See, *e.g.*, Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands Amici Br., *Kiobel* v. *Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) (No. 10-1491); Federal Republic of Germany as Amicus Br., *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). Many such suits pursued policy objectives that were even inconsistent with the foreign policy of the United States itself. For example, a putative class of all those persons injured by the South African Apartheid regime sued numerous multinational corporations that had done business with that regime, which the Second Circuit initially allowed to proceed. See *Khulumani* v.

*Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). As the United States observed in supporting certiorari, its own foreign policy had encouraged "economic ties with black-owned companies and urged companies to use their influence to press for change away from apartheid." United States Amicus Br. at 21, *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919). The Solicitor General further observed that "[s]uch policies would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence." *Ibid.* Similarly, in *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007), plaintiffs sued the American company that had sold bulldozers to the State of Israel, which were allegedly used to demolish the plaintiffs' homes. The United States was again required to intercede, to urge dismissal of litigation that would directly undermine American foreign policy to provide military aid to Israel. United States Amicus Br., *Corrie*, 503 F.3d 974 (No. 05-36210). Here, likewise, as described further below, pp. 14-20 *infra*, plaintiffs' suit, if successful, would have the effect of discouraging the expansion of the formal banking sector in the Middle East, thereby undermining U.S. foreign policy in the region.

2. Projecting U.S. common law onto foreign corporations' foreign activities also risks subjecting them to inconsistent regulatory regimes, as the litigation of this case again demonstrates. In a series of rulings, the district court penalized Arab Bank for complying with its legal obligations in the other sovereign states in which it does business. In *Linde* v. *Arab Bank, PLC*, the district court ordered the Bank to turn over the account

records of tens of thousands of the Bank's customers. 269 F.R.D. 186 (E.D.N.Y. 2010). But many of the countries where the Bank has operations have strict laws that prohibit the kind of sweeping disclosure of customer's sensitive financial data that the district court ordered. See Jordanian Banking Law No. 28 of 2000, arts. 72-75, 88; Lebanese Law of September 3, 1956 on Banking Secrecy, arts. 2, 8; Palestinian Territories Banking Law No. 2 of 2002, arts. 5, 26, 56. Such data privacy laws are not unique to the Middle East; countries in the European Union have similarly stringent data privacy laws. See European Union Directive 95/46/EC, 1995 O.J. L281 (1995); European Commission, *Status of Implementation of Directive 95/46 on the Protection of Individuals with regard to the Processing of Personal Data* (last visited Aug. 24, 2017), http://ec.europa.eu/justice/data-protection/law/status-implementation/index_en.htm. The countries where the customers' records were located refused to allow the Bank to produce them. Had it violated its obligations under those countries' privacy laws, the Bank would have jeopardized its licenses to operate, and would have risked prosecution for itself and its employees. The district court imposed discovery sanctions on the Bank for complying with local law. Among the sanctions it imposed was an instruction that the jury could draw the inference that Arab Bank knowingly and purposefully provided financial services to foreign terrorist organizations—issues that "of course, lie at the core of its * * * ATS liability." *Linde* v. *Arab Bank, PLC*, 706 F.3d 92, 102 (2d Cir. 2013) (declining to exercise jurisdiction under the collateral order doctrine and refusing to vacate the sanctions order via writ of man-

damus), cert. denied, 132 S. Ct. 2869 (2014). The Bank was, moreover, precluded from explaining to the jury that foreign bank secrecy laws were the reason it could not produce the documents. *Linde*, 269 F.R.D. at 205. These sanctions would have rendered the Bank effectively powerless to defend itself on key issues establishing liability.[2]

Given the extensive regulation to which corporations are subject under domestic law, such conflict between the ATS and domestic regulatory regimes would be common if ATS liability were extended to corporations. This is undoubtedly one reason that there is no tradition of corporate liability under international law. See pp. 27-33 *infra*. And it is further reason why this Court's "cautious" approach to expanding the scope of ATS liability applies to the question of corporate liability presented here.

### D. As This Case Demonstrates, Extending ATS Liability To Secondary Actors Would Be Counter-Productive, By Driving Financial Activity In The Middle East Under Ground

Petitioners' broad theory of corporate liability would threaten all banks in the Middle East, forcing

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[2] The ATS claims were ultimately dismissed as a result of the Second Circuit's determination (under review here) that corporations are not subject to liability under the ATS. Order Granting Defendants' Motion to Dismiss Plaintiffs' ATS Claims, *Linde* v. *Arab Bank, PLC*, No. 04-cv-2799 (E.D.N.Y. Aug. 23, 2013), Minute Order Following DE 982, *Linde*, No. 04-cv-2799; see *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) (holding that corporations were not subject to liability under the ATS), aff'd on other grounds, 133 S. Ct. 1659 (2013).

them to constrict severely their activities in order to avoid potentially devastating liability. Under petitioners' theory, any bank would be liable simply for failing to intercept transactions that are even tangentially related to terrorist activities. Under their view, there is no need to demonstrate a direct connection between the transaction and the terrorist activity that harmed the plaintiffs, nor to show that the bank should have prevented the transaction. Even a bank that—like respondent—has complied with all of its regulatory obligations under the laws of the United States and the domestic laws of the countries where it operates could be subjected to liability. Given the political conditions that currently exist in the Middle East, petitioners' theory amounts to virtual strict liability for financial institutions operating in the region.

In many of the countries in which UAB's members operate, violent conflict is a pervasive feature of everyday life, and has been for decades. Many designated terrorist organizations have active, pervasive presences. Conflict with Israel has marked much of the last seven decades of the Palestinian Territories' history. Hamas—which has been designated a terrorist organization by the United States—retains de facto control of the Gaza Strip, and exerts a heavy influence over the entire Palestinian Territories. The situation in Iraq has been similarly unstable for many decades. Since the 1980s, Iraq's history has been one of virtually constant war, first with Iran, then Kuwait, then among segments of the country's Shia and Kurdish populations. Since the U.S.-led invasion in 2003, there have been years of fighting between insurgents and occupying forces, and now Iraq now confronts the growing influ-

ence of the Islamic State. The Islamic State also has a strong presence in Syria, which is in a state of civil war, and where the al-Nusrah Front—another U.S.-designated a terrorist organization—is also active. Lebanon, too, has a recent history of armed conflict: a protracted civil war, several terrorist attacks, and ongoing violence in the border regions. Though Jordan has been one of the safer countries in the region, it has recently experienced attacks on security forces from violent extremist groups.

This turmoil, and the presence of so many terrorist organizations, already creates significant challenges to banks operating in the region. To mitigate the risks of terrorist financing, UAB's members already must comply with the myriad regulatory requirements imposed by countries throughout the Middle East and elsewhere. See pp. 27-33, *infra*. Many banks—including respondent—take additional proactive steps to combat terrorist financing that go far beyond the regulatory requirements. See pp. 16-17, *infra*. At the same time, they must continue to provide effective, reliable financial services to their customers, thereby helping to maintain economic stability and to connect local business interests to the rest of the region and the world. These are vital aspects of the region's movement toward peace and prosperity.

These functions would be threatened, however, by the aggressive common law expansion the petitioners pursue here. Any bank that fails to meet the required risk management standards is already subject to severe regulatory penalties. See pp. 27-33, *infra*. UAB and its members are committed to those regulatory standards and to holding banks accountable to meet them. Re-

spondent consistently exceeds those standards. See, *e.g.*, *Gill* v. *Arab Bank, PLC*, 893 F. Supp. 2d 542, 565 (E.D.N.Y. 2012) (stating that the Bank has long taken the optional step of instituting computerized screenings of all global branches against OFAC lists of designated terrorists); C.A. App. 1978-1798, ¶ 19. Petitioners, however, push for relaxed standards of liability under which Middle Eastern banks could barely function without exposure to liability. Given the current climate, there is a significant possibility that some transaction may have had a remote tie to regional conflict, such as transfers involving relatives of combatants or opposition groups—as alleged by petitioners—and that the activities of those groups may be alleged to be violative of international law. As regulators recognize, it is not feasible for banks to eliminate any possibility that funds passing through the banks will never be remotely related to illicit activities. See pp. 27-33, *infra*. Petitioners would supplant that regulatory regime with a rule of federal common law holding banks to a virtual strict liability standard whenever a jury determines that funding somehow related to activities violating international law passed through the bank. Middle-Eastern banks' potential liability would be essentially limitless.

The existential threat of ATS liability against Middle-Eastern banks would *hinder*, rather than help, international efforts to prevent terrorist financing. The primary drivers of those efforts are domestic regulators and banks themselves. Domestic regulators cooperate with one another through formal agreements and the sharing of strategy and intelligence. Banks are partners in the fight against terrorist financing. Every

indication suggests that respondent has not only met but exceeded the anti-terrorist financing requirements to which it is subject, including those of Jordan, Lebanon, Palestine, and Israel. C.A. App. 6297-6309, ¶¶ 73-103 (explaining that respondent's policies exceeded standards of the Palstine Monetary Authority and were more advanced than those of Israeli banks); *id.* at 4061-4065, ¶¶ 25-31 (explaining that respondent's policies and practices conformed with international best practices); *id.* at 4087-4100, ¶¶ 15-62 (describing Lebanon's efforts to prevent terrorist financing and respondent's record of maintaining high standards for compliance and of receiving "high ratings with no findings of any significant deficiencies"). Indeed, respondent is an industry leader in the proactive steps it has taken to detect and eliminate terrorist financing. Since the mid-1990s, it has screened account applicants and financial transactions against local blacklists as well as internal bank blacklists. See *Gill*, 893 F. Supp. 2d at 565. Long before it was legally obliged to do so, respondent screened clients and transactions against the list of individuals and entities designated by the U.S. government as terrorists. See pp. 27-33, *infra*. Imposing liability on respondent, despite its industry-leading example in combatting terrorist financing, would signal to other banks that such efforts are pointless.

Rather than encouraging cooperation with regulators and increased vigilance, subjecting respondent to liability would lead to a large-scale retrenchment in the Middle East's formal financial sector. The looming threat of disastrous ATS judgments would almost certainly lead to broad "de-risking" efforts. De-risking refers to the disassociation by a business from individuals

or entities to avoid exposure to risk. Banks "de-risk" when they terminate business relationships with certain clients to avoid financial or reputational risks. See, *e.g.*, World Bank Group, *Stakeholder Dialogue On De-Risking: Findings and Recommendations* (2016), http://files.acams.org/pdfs/2016/Derisking-Final.pdf. For example, the American Bankers Association recently noted that banks around the world are closing foreign correspondent accounts because authorities have increased the expectations on banks for monitoring correspondent banks and notifying those banks of potential money laundering concerns. Letter from Virginia O'Neill, Am. Bankers Ass'n, to Hon. Steven T. Mnuchin, Dep't of the Treasury at 17 (July 31, 2017) (ABA Letter), https://www.aba.com/Advocacy/commentletters/Documents/cl-Treas-RevRegs2017.pdf. If Middle Eastern banks are threatened with debilitating ATS liability, some may respond by dramatically curtailing their activities, leaving large segments of the economy to conduct their financial affairs through an unregulated, shadow financial sector. Others may attempt to withdraw from transactions that could even be seen to "touch and concern" the territory of the United States. See pp. 33-37, *infra*. And in some instances, customers will attempt to disassociate themselves from the Middle-Eastern banking system out of concern that the threat of large money judgments could destabilize them.

Whether the "de-risking" that occurs is in the form of banks curtailing their business relationships or customers withholding their funds from banks, the ultimate consequences could be dire for the region's financial system, and for governmental policy goals in the

Middle East. Financial transactions would more frequently occur via unregulated channels, circumventing the collaborative system by which banks and domestic regulators currently detect and intercept transactions involving terrorists. See Yaya Fanusie & Landon Heid, *What ISIS Is Banking On*, Forbes (June 17, 2016). By reducing the funds available in the formal banking sector to facilitate economic investment, such a contraction would also severely undermine the goal of fostering economic development in the region as a way to enhance stability and combat terrorism. See Lloyd J. Dumas, *Counterterrorism and Economic Policy*, 21 Transnat'l L. & Contemp. Probs. 84, 88-89 (2012) (explaining that economic development should reduce financial and practical support for terrorists).

As the above demonstrates, judicial expansion of federal common law liability for the conduct of commercial activities abroad would have dangerous ramifications. As directed at foreign banks, petitioners' broad theory of liability would have the counterproductive effect of undermining the more nuanced and targeted security methods that U.S. and foreign governments have already established for the banking sector. This would be directly at odds with the cautious approach the Court requires before expanding the scope of liability under the ATS.

## II. International Law Norms Do Not Provide For Corporate Liability

A necessary precondition for the creation of a new basis of common law liability under the ATS is that such liability is "definable, universal, and obligatory" under the law of nations. *Sosa* v. *Alvarez-Machain*, 542

U.S. 692, 732 (2004). To determine whether corporations may be held liable under the ATS for violating the law of nations, the Court must determine whether sovereign states recognize a binding norm of corporate liability in international affairs. A review of the historical underpinnings of international law and modern state practice demonstrates that corporate liability is not the province of international law. Instead, domestic and transnational regulation properly enforces norms of corporate behavior of the type the petitioners seek to impose.

### A. The Law Of Nations Determines Who May Be Held Liable Under The ATS

International law limits the types of actors that federal common law can hold liable. In *Sosa*, the Court made clear that the relevant question in deciding whether a particular type of defendant might be liable under the ATS is "whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued." 542 U.S. at 732 n.20 (2004). Justice Breyer likewise agreed that "[t]he norm [of international law at issue] must extend liability to the type of perpetrator * * * the plaintiff seeks to sue." *Id.* at 760 (Breyer, J., concurring) (citing *id.* at 732 n.20 (opinion of the Court)). The courts of appeal have similarly recognized that "*Sosa* expressly frames the relevant international-law inquiry * * * [as] consider[ing] separately each violation of international law alleged and which actors may violate it." *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011) (en banc), vacated on other grounds, 133 S. Ct. 1995 (2013).

Looking to international law to resolve questions of *who* can be held liable and *on what basis* is no less important than looking to international law for the substantive norms of conduct themselves. The First Congress enacted the ATS to provide a forum for violations of international law for which the United States would be expected to supply a means for redress. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013). Creating *new* theories of liability or expanding the reach of liability to *new* defendants does not serve that purpose, but instead threatens to engender the very diplomatic discord the ATS was intended to defuse. See pp. 7-9, *supra*. Thus, the ATS can be read to provide a forum for claims against corporations only if the law of nations recognizes that corporations can be liable for violating its norms.

### B. The Law Of Nations Does Not Provide For Liability Against Corporations

Regulating corporations is not the province of customary international law. Corporate liability was not within the contemplation of the First Congress when it passed the ATS, because there was no precedent for international corporate liability. Modern state practice confirms that this remains true today. Then and now, international law primarily addresses the relationships between sovereign states. Where it touches on the conduct of individuals, it does so within tightly defined spheres. The regulation of corporations—a role more appropriately served by domestic regulation and transnational cooperation, see pp. 27-33, *infra*—falls outside the purview of customary international law.

In *Sosa*, the Court laid out a brief taxonomy of the categories of the law of nations that existed at the time the ATS was enacted. As it does today, international law primarily addressed the relationship between sovereign states. *Sosa*, 542 U.S. at 714 (referring to "the general norms governing the behavior of national states with each other"); see 1 Oppenheim's International Law 4 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1992). While one such category encompassed mercantile causes of action, questions of international trade, and issues related to shipwrecks, *Sosa*, 542 U.S. at 715, the ATS was directed to the second category—the "sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships." *Ibid.* These included the historical examples that were the "paradigmatic" examples of the ATS's intended scope: violation of safe conducts, assaults on ambassadors, and piracy. *Ibid.* These norms that applied directly to individuals were narrow exceptions to the general rule that international law applies only to states.

No subsequent developments suggest that the types of customary international law norms that the ATS encompasses have expanded to reach the conduct of commercial activities by corporations. A principle becomes a binding customary norm of international law only if it is "a general and consistent practice of states followed by them from a sense of legal obligation." 14A C. Wright, A Miller, & E. Cooper, *Federal Practice & Procedure* § 3661.1 (4th ed. 2017); *see The Paquette Habana*, 175 U.S. 677, 686-712 (1900) (conducting a detailed review of authoritative sources of international law to determine whether states consistently exempted

coastal fishing vessels from capture during wartime, and did so out of a sense of legal obligation). As the Court stated in *Sosa*: a norm is recognized by the law of nations only if it is "definable, universal, and obligatory." *Sosa*, 542 U.S. at 732-734.

There is no "definable, universal, and obligatory" state practice of holding corporations liable under international law. Indeed, modern practice demonstrates the opposite: regulation of corporations still falls outside the bounds of customary international law norms of the type enforced under the ATS.

In numerous recent examples, when the international community constituted tribunals to enforce international law norms, the nations that created the bodies excluded corporations from their scope. Corporations were intentionally excluded, for example, from the jurisdiction of the International Criminal Court. The text of the Rome Statute—which governs the operations of the court—provides that the court "shall have jurisdiction over *natural* persons pursuant to this Statute." Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M 1002 (July 17, 1998). The treaty's negotiators rejected the French delegation's suggestion that the court should have jurisdiction over corporations in the event of "individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of and with the explicit consent of the corporation and in the course of its activities." Kai Ambos, *Commentary on the Rome Statute of the International Criminal Court* 475-478 (O. Triffterer ed. 2008). Similarly, recent international war crimes tribunals were given no authority to

exercise jurisdiction over corporations. The statutes of the International Criminal Tribunals for both Rwanda and Yugoslavia have explicitly limited the tribunals' jurisdiction to "natural persons." See Statute of the International Criminal Tribunal for Rwanda, art. 5, Nov. 8, 1994, 33 I.L.M. 1598; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 6, May 25, 1993, 32 I.L.M. 1192.

Petitioners' reliance (Pet. Br. 49) on the Nuremberg Tribunal is misplaced. While that Tribunal did find that a corporation violated international legal norms, the Tribunal's more relevant finding was that it lacked jurisdiction over corporations, as petitioners acknowledge. The Tribunal explained this absence of jurisdiction in part on the ground that imposing corporate liability would injure innocent individuals. Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum L. Rev. 1094, 1120-1122 (2009). In other words, there was no established norm of international law for subjecting the corporation as an independent entity to liability for the conduct of individual persons—even if those individuals had used the corporation to carry out their acts. Thus, the Tribunal's statement that the corporation had violated international law must be understood as a statement of moral responsibility rather than legal liability.

Petitioners also overstate the significance of the 2014 decision of the Special Tribunal for Lebanon's appeals panel that the Tribunal could try a legal entity for contempt. The most salient aspect of the Lebanon Tribunal is that its criminal jurisdiction extends only to natural persons. Statute of the Special Tribunal for

Lebanon of 29 Mar. 2006, art. 3. The appeals panel invoked a provision of its procedural rules to support its assertion of contempt jurisdiction over a corporate entity as to which it lacked substantive jurisdiction. *Prosecutor* v. *New TV S.A.L. & Al Khayat*, Case No. STL-14-05/PT/AP/AR 126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings at 18 (Special Tribunal of Lebanon Oct. 2, 2014) (emphasis added), https://www.stltsl.org/index.php?option=com_k2&id=4863_00471300c52852c98925d30848cb613a&lang=en&task=download&view=ite. The appeals panel reasoned that contempt authority is a distinct tool to assist the Tribunal in ensuring expeditious administration of justice for those over whom it did have substantive jurisdiction. *Id.* at 23. Notably, unlike other international tribunals, the Special Tribunal for Lebanon applies *domestic* criminal law. And the Tribunal's Appeals Chamber specifically relied on this distinctive feature of the Tribunal's authority in upholding the contempt order, stressing "that it is foreseeable *under Lebanese law* that legal entities could be subject to criminal proceedings." *Id.* at 19. The Tribunal's decision was noted for having been both unprecedented and controversial in the context of customary international law and therefore as "not provid[ing] a strong legal basis for the future development of corporate criminal liability." Anne-Marie Verwiel & Karlijn van der Voort, *STL Appeals Chamber Decides It Can Prosecute Legal Persons For Contempt*, Int'l Justice Monitor (Oct. 13, 2014), https://www.ijmoni-tor.org/2014/10/stl-appeals-chamber-decides-it-can-prosecute-legal-persons-for-contempt/. Thus, the Tribunal's decision was either a

wrongly decided outlier or (at best for petitioners) an unprecedented exercise of ancillary jurisdiction on the basis of one country's criminal law. Neither explanation supports petitioners here.

In the absence of any "definable, universal, and obligatory" norm of corporate liability under the law of nations, American courts lack authority to create such a basis for liability as a matter of federal common law that will be projected on foreign actors in foreign lands.

### C. Domestic And Cooperative Cross-Border Regulatory Measures Are The Appropriate Tools For Regulating Corporate Conduct Such As Monitoring Customer Transactions

Petitioners effectively seek to hold banks accountable for all actions and events that have some connection to money that has passed through their systems by way of deposits, withdrawals, and funds transfers. The decision whether such burdens, which would be virtually impossible to satisfy, should be placed on corporations is not well-suited to judges expanding on U.S. common law, but rather is the province of regulators, who can tailor such solutions to the specific industry and country at issue. These agencies can also adjust the regulations over time as circumstances change and as the agencies learn through observation and feedback from stakeholders. See, *e.g.*, ABA Letter at 5-20 (suggesting that U.S. regulations be recalibrated to allow banks to more effectively counter terrorist financing and other illicit activities); *id.* at 16 (suggesting limiting screening obligations to the financial institution that first handles a transaction crossing into the United

States, because constant rescreening "consumes limited resources that could be put to better use").

A problem as complex and multifaceted as terrorist financing demands a solution attuned both to the specific threats at issue and the other germane factors. Regulators seek to reduce the risk of transactions benefiting terrorist organizations while balancing that goal against the need to allow banks to continue to operate. To function effectively, banks must allow legitimate businesses and individuals to transfer and access money, and must keep up with the demanding pace of the modern economy. No bank could meet these goals if required to subject every transaction to the level of scrutiny petitioners' theory demands. A bank could not function effectively, for example, if required to stop each transaction and manually determine whether there is any potentially derogatory online information about a party to that transaction, or with a similar name to a party. In 2015 alone, banks in the United States processed over 144 billion noncash payments. 2016 Federal Reserve Payments Study at 3 (Dec. 22, 2016). The volume of these transactions continues to increase. *Ibid.*

In this environment, regulators cannot impose standards guaranteeing that terrorist dollars will never pass through a bank, but can require suitable measures to manage risk and respond appropriately to red flags. Banks are subject to a constellation of regulatory obligations aimed at inhibiting terrorist financing. These regulations operate within the United States, within the other jurisdictions in which the banks do business, and on a transnational level.

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) coordinates domestic risk-management efforts, and can sanction non-compliant banks. OFAC requires systems likely to identify transactions directed to listed terrorists, terrorist entities, and sponsors of terrorism who are subject to U.S. trade sanctions. See 31 C.F.R. 594.201(a), 597.201(a). Specifically, OFAC requires banks to prevent transactions with "specially designated terrorists"—persons designated by various government agencies and incorporated in a list of Specially Designated Nationals. See 31 C.F.R. 595.201(a), 595.311(a) & note 1.

OFAC does not, however, expect that banks will screen transactions for unknown terrorist groups, future terrorists, or even controversial groups that may later be labeled as terrorists. Rather, it requires systems to prevent transactions involving known threats. It actively encourages banks to use automated screening systems to monitor customers and transactions. See U.S. Dep't Treasury, *OFAC Regulations for the Financial Community* (OFAC) 3 (2002), http://www.treasury.gov/resource-center/sanctions/documents/facc bk.pdf. The use of interdict software is one of several factors OFAC considers—along with self-disclosure and other compliance initiatives—before sanctioning banks that fail to block prohibited transactions. *Id.* at 2-3.

Many foreign banks are also subject to OFAC sanctions. OFAC's regime applies not only to banks organized under U.S. law, but also to foreign banks located in the United States and foreign subsidiaries of U.S. banks. See 31 C.F.R. 594.304, 594.308; OFAC at 4.

In practice, the reach of OFAC sanctions is far broader than banks with a U.S. presence. OFAC may impose trade sanctions on banks that "provide financial, material, or technological support for * * * [a]cts of terrorism." 31 C.F.R. 594.201(a)(i). If foreign banks finance terrorism, they themselves risk being placed on the OFAC trade sanctions list—a serious punishment that would isolate the bank from the international banking community.

U.S. regulation is just a small part of the multinational regulation of the banking sector. Banks must also comply with the regulatory regimes of all the other countries in which they do business. Arab Bank's presence in Jordan, for example, subjects it to a number of obligations to determine the financing of terror. See, *e.g.*, Jordanian Penal Code, art. 147; Central Bank of Jordan, Regulations of Anti-Money Laundering and Terrorism Financing, Circular No. 29/2006, arts. V-VIII (2006); Jordanian Anti-Money Laundering Law of 2007, art. VII. Lebanon, similarly, has a well developed regulatory regime to reduce the risk of money laundering and terrorist financing, including a monitoring requirement and an obligation to report suspicious transactions to the Special Investigation Commission. See Law No. 44 of November 24, 2015. In Egypt, an independent financial intelligence unit—the Egyptian Money Laundering and Terrorist Financing Combating Unit—investigates potential instances of terrorist financing, shares information, and works to ensure that banks have adequate risk-management systems in place. See Anti-Money Laundering Law No. 80 of 2002. Kuwait's Central Bank instructs financial institutions on how to identify and prevent terrorist financing,

while the independent Financial Intelligence Unit investigates suspicious transactions and entities. See Law No. 106 of 2013 Regarding the Combating of Money Laundering and Financing of Terrorism; Ministerial Resolution No. 1532 of 2013. The Palestinian Territories also impose stringent requirements to combat terrorist financing, including in the West Bank. See Anti-Money Laundering and Terrorism Financing Decree Law No. 20 of 2015. All of these nations, and many others, are members of the Middle East and North Africa Financial Action Task Force (MENAFATF), which fosters regional cooperation to combat money laundering and terrorist financing. Financial Action Task Force, *MENAFATF*, http://www.fatf-gafi.org/pages/menafatf.html (last visited Aug. 24, 2017).

Banks are therefore subject to a multinational network of regulation. Several international bodies and instruments coordinate the network, ensuring that the numerous domestic regimes work harmoniously. See, *e.g.*, United Nations, International Convention for the Suppression of the Financing of Terrorism, art. 12, Dec. 9, 1999, 2178 U.N.T.S. 235; Memorandum of Understanding Between the Governments of the Member States of the Middle East and North Africa Financial Task Force Against Money Laundering and Terrorist Financing (Nov. 30, 2004); Fin. Action Task Force, FATF Recommendations (2016): International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation nos. 9, 37, 40 (2012).

Thus, a bank that operates across borders does not evade regulation. Rather, the bank becomes subject to *several* different regulatory regimes. Arab Bank must comply with both the OFAC regulations and the Jorda-

nian rules, among others. Contrary to petitioners' contention, there is no void for judge-made customary international law to fill—and no basis for U.S. common law to recognize novel international norms as a stopgap. In the banking sector, as in others, regulatory solutions are an effective and appropriate way to control corporate behavior.

Indeed, cross-border corporate actions—subject to regulation on both sides of the border—contrast sharply with the types of paradigmatic "international" conduct the ATS was intended to reach: assaults on ambassadors, violation of safe conducts, and piracy. See *Sosa*, 542 U.S. at 715. These norms all covered conduct traditionally beyond the reach of domestic regulation. They occupied "a sphere in which * * * rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships." *Ibid.* Because piracy occurs on the high seas, it is likely to touch on foreign actors or interests. At the time the ATS was enacted, American courts had no other way to address piracy. It was not until the following year that Congress passed its first anti-piracy law. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112. The principle of safe conducts required sovereigns to protect *aliens* within their territory or control, not a as a way to facilitate "intercourse or commerce between one nation and another." 4 William Blackstone, *Commentaries on the Laws of England* 68-69 (1769). Assaults on ambassadors were likely "[u]ppermost in the legislative mind," *Sosa*, 542 U.S. at 720, in part because several embarrassing incidents had proven the United States powerless to provide remedies when these assaults occurred on American soil, *Kiobel*, 133 S. Ct. at 1668. In each of

these cases, the ATS allowed a forum for U.S. common law to reach previously unreachable conduct.

By contrast, the well developed regulation of domestic and transnational actions by banks and other corporations indicates that customary international law has no role to play. It is therefore unsurprising that the international community has not recognized binding norms subjecting corporations to liability. There is no need for American courts to create new federal common law that will serve only to upset this carefully crafted complex of domestic and transnational regulations that already apply to banks such as respondent and UAB's member institutions.

## III. Even If Corporations Could Be Liable Under The ATS, The Claims In This Case Are Impermissibly Extraterritorial Because All The "Relevant Conduct" From Which Claims Arose Occurred Abroad

The plaintiffs here seek damages for injuries suffered overseas as a result of conduct that occurred entirely overseas. Neither respondent, nor petitioners, nor any of the terrorists responsible for their injuries are U.S. citizens. The defendant is a Jordanian bank. All of the relevant bank accounts with Arab Bank are located outside the United States. And all of the transactions at issue originated outside the United States. These allegations lack the necessary nexus to the United States to support the exercise of jurisdiction under the ATS, even if the statute did encompass claims against corporations.

Federal courts have jurisdiction under the ATS only if plaintiffs' claims "touch and concern the territory

of the United States * * * with sufficient force to displace the presumption against extraterritorial application." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). Claims fall short of this standard when "all the relevant conduct took place outside the United States." *Ibid.* Here, all the "relevant conduct" occurred outside the United States, so the claims do not "touch and concern the territory of the United States"—much less with the force the ATS requires.

Petitioners' only mention of a nexus to American territory refers to the clearing of dollar-denominated payments through Arab Bank's New York branch. Pet. 8. This attenuated connection cannot be a sufficient basis for jurisdiction under *Kiobel*. There, the Court explained that the ATS was enacted to provide relief for violations of the law of nations only when they occurred in the United States, not in another sovereign's territory. *Kiobel*, 133 S. Ct. at 1668-1669. "[F]ar from avoiding diplomatic strife, providing such a cause of action could have generated it." *Id.* at 1669. The territorial principle of the ATS is intended to serve as a meaningful limit. "[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010).

Under petitioners' expansive theory, American courts would create and project common law liability against foreign banks for overseas conduct perpetrated by the bank's foreign national customers against other foreign nationals, merely because some overseas financial transaction related to the customer's wrongful act was denominated in U.S. dollars. To approve such a

fact pattern as satisfying the requirement of a territorial connection to the United States would be tantamount to eviscerating the extraterritorial limitation altogether.

As discussed above, most foreign banks use CHIPS for processing transactions in U.S. dollars. See p. 10, *supra*. Allowing every foreign bank's use of CHIPS to satisfy *Kiobel*'s "touch and concern" standard would extend the jurisdictional reach of the ATS far beyond what Congress intended. Many foreign banks would be subject to liability for automated transactions they process on a daily basis with little or no active involvement. In 2015 alone, foreign banks made over 438,000 individual CHIPS transactions. See CHIPS. As petitioners would have it, any one of these transactions could subject a foreign bank to liability if it was sent by or routed to a person or entity that had violated international law. The bank would be liable even if it had complied with all regulatory risk-management requirements, and even if the transaction could not have been prevented without a manual investigation of every fund transfer. Any foreign bank—and especially any bank that conducts business in a region where terrorist acts are prevalent—would risk ATS liability merely by maintaining a U.S. branch capable of processing dollar-denominated transactions. Such a rule would directly contradict *Kiobel*'s instruction that, in determining ATS jurisdiction, "it would reach too far to say that mere corporate presence suffices." 133 S. Ct. at 1669.

Indeed, imposing liability in these circumstances would fail to satisfy even the standard suggested in Justice Breyer's concurring opinion in *Kiobel*, which was more permissive than the one the majority en-

dorsed. See 133 S. Ct. at 1670. Justice Breyer suggested that a court could assert jurisdiction under the ATS where:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

*Id.* at 1671. Petitioners' claims satisfy none of those tests. Notably, petitioners have identified no national interest that requires allowing foreign nationals to sue a foreign bank when that bank is already subject to the regulatory supervision of federal authorities.

If regulators in the United States and other jurisdictions conclude, after weighing the competing considerations discussed above, that more burdensome requirements should be imposed on banks in the Middle East, to prevent terrorist organizations or their sponsors from utilizing the formal financial system, they have every power to do so. Any such regulation will be calibrated to balance the government's various objectives, including encouraging economic development and the formal financial sector. The extraterritorial projection of U.S. common law is unwarranted in such circumstances, and Congress has granted the courts no authority to do so.

Thus, the Court could and should conclude on the basis of nonextraterritoriality alone that petitioners' claims against respondent under the ATS are beyond the jurisdiction of the U.S. courts.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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